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SOVEREIGN IMMUNITY—AN ANATHEMA TO THE "CONSTITUTIONAL TORT"

The balance of power that exists between the United States Supreme Court and the Congress in our constitutional system is a precarious one. The respective responsibilities of the two bodies are often vague and frequently hotly contested.¹ The Court, as final arbiter of the Constitution, is often accused by critics of sitting as a "super-legislature," immune from the demands of an electorate and free to capriciously alter the Constitution.² Judicial "activists," on the other hand, maintain that the Court is simply performing its traditional function by protecting enumerated constitutional rights against governmental encroachment.³

In June of 1971, the Supreme Court decided *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*⁴ which, in essence, recognized a cause of action allowing an individual to receive money damages for a federal violation of his constitutionally protected civil rights. This comment will discuss the nature of this cause of action and its relation to the government in terms of the conflicting interests of federal courts in safeguarding an individual's constitutional rights and those of Congress in precluding certain suits against the government. The obvious question presented is this: May the federal government violate one's constitutional rights and yet be immune from liability by operation of the doctrine of sovereign immunity? Although couched in the narrow terms of sovereign immunity and constitutional tort, the underlying issue is the proper function of judiciary and legislature in our constitutional democracy.

¹ See Deutch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

² This issue has aroused the passions of many observers. Senator Sam J. Ervin, Jr. of North Carolina has stated:

[T]he course of the Supreme Court in recent years has been such as to cause me to ponder the question whether fidelity to fact ought not to induce its members to remove from the portal of the building which houses it the majestic words, "Equal Justice Under Law," and to substitute for them the superscription, "Not justice under law, but justice according to the personal notions of the temporary occupants of this building."

The truth is that on many occasions during recent years the Supreme Court has usurped and exercised the power of the Congress and the States to amend the Constitution while professing to interpret it.

Ervin, *The Role of the Supreme Court as the Interpreter of the Constitution*, 26 ALA. LAW. 389, 391 (1965). For a more scholarly approach to this issue, see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

³ For an interesting discussion of this issue, see Barron, *The Ambiguity of Judicial Review*, 1970 DUKE L.J. 591.

⁴ 403 U.S. 388 (1971).

A BIVENS ANALYSIS

The complaint in *Bivens* alleged that agents of the Federal Bureau of Narcotics made a search which, because of the lack of probable cause, amounted to a violation of the plaintiff's fourth amendment rights.⁵ Plaintiff *Bivens* brought a civil action in a federal district court⁶ based upon, *inter alia*, the theory that a cause of action existed against the federal officers and that the district court acquired jurisdiction because of the constitutional issue involved.⁷ The district court, however, dismissed the complaint for lack of jurisdiction, holding that no federal question had been raised.

On appeal the Second Circuit was somewhat more sympathetic to *Bivens'* claims, stating that the district court should have taken jurisdiction under 28 U.S.C. § 1338.⁸ However, the court held that "[s]tatutory authority is a prerequisite for a federal cause of action for damages, even though the wrong complained of is the violation of a constitutional right."⁹ Therefore, the complaint was dismissed for failure to state a claim for which relief could be granted.¹⁰

The United States Supreme Court, per Justice Brennan, reversed and held that a valid cause of action based solely upon a violation of the fourth amendment did exist and that damages could be obtained for any resulting injuries despite the absence of congressional authorization.¹¹ The Court reasoned that an individual's fundamental rights—here his fourth amendment guarantees—need to be protected in a federal forum and, absent specific congressional prohibition, the Court possesses authority to award money damages.¹² The doctrine thus expressed by the Court seems to give impetus to a new kind of constitutional cause of action in which courts may compensate for injuries arising out of a governmental violation of certain constitutional rights.

Although the opinion announces no revolutionary principles of law, the doctrine enunciated in *Bivens* is unique in our legal sys-

⁵ U.S. CONST. amend. IV.

⁶ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 276 F. Supp. 12 (E.D.N.Y. 1967).

⁷ 28 U.S.C. § 1331(a) (1966), states that:

[T]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

⁸ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 409 F. 2d 718, 720 (2d Cir. 1969).

⁹ *Id.*

¹⁰ See FED. R. Crv. P. 12(b)(6).

¹¹ 403 U.S. 388 (1971).

¹² *Id.* at 394-97.

tem.¹³ Prior to this decision, claims such as *Bivens*' had to be adjudicated in a state court and were subject to the vagaries of state tort law.¹⁴ Since state tort law was neither designed nor intended to protect constitutional guarantees, state remedies for constitutional violations were woefully inadequate.¹⁵ Thus, the Court found it necessary, in order to secure the fundamental interest conveyed by the fourth amendment, to distinguish between *Bivens*' claim and a conventional tort action. With the *Bivens* decision, civil claims based upon the violation of certain constitutional rights appear to occupy a new, preferential status in the law. The exact extent of this status, however, is still to be determined.¹⁶

RAMIFICATIONS OF BIVENS

Bivens concerns the violation of a fourth amendment right by federal officials.¹⁷ Yet, there is little in the decision to indicate that the constitutional cause of action expounded therein is limited to the narrow facts of that case. The case was decided in terms of "federally protected interests" and the power of the Court to "[a]uthorize damages as a judicial remedy for the violation of a federal constitutional right."¹⁸ The language of the decision does not isolate the

¹³ See Justice Harlan's carefully reasoned concurring opinion. *Id.* at 398.

¹⁴ Justice Brennan emphasizes the lack of an adequate civil remedy in a state court for an unreasonable search and seizure. The only basis for recovery would be under a trespass or invasion of privacy tort theory, and certain defenses may be available to defeat such an action. Such defenses would effectively crush the right created by the Constitution. In *Bivens*, the federal agents, although acting in violation of the fourth amendment, were allowed inside the house by *Bivens* because of their apparent federal authority. The defense of consent might possibly be available to the agents; if so, it could defeat an action for trespass or invasion of privacy. See 403 U.S. at 394. This argument is equally valid as applied to other fundamental rights since actions in tort may not even exist at the state level that approximate the interest created by the Constitution. For example, a first amendment violation of an individual's freedom of speech has no parallel tort remedy; thus, such a right cannot be adequately protected in a state court on conventional tort grounds.

The need for a civil remedy is particularly acute in the *Bivens* situation. *Bivens* was not criminally prosecuted and a remedy such as that typified by the exclusionary rule would obviously be inappropriate.

¹⁵ The Court stated that "[t]he interests protected by the state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." 403 U.S. at 394.

¹⁶ In *Bivens*, the question as to the government's immunity was not decided since the issue was not raised in the courts below. 403 U.S. at 397-98. That issue will be explored later in this comment.

¹⁷ Upon remand, the question of immunity was discussed by the Second Circuit and the court held that the federal officers were not protected by governmental immunity. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972). Circuit Judge Medina, however, avoided any direct confrontation with the issues of sovereign immunity or the Federal Tort Claims Act and the questions raised in this comment remain alive.

¹⁸ 403 U.S. at 400-01.

fourth amendment as the sole basis for a cause of action; the Court stressed the need for a forum to adequately redress *any* injury based upon federally protected rights.¹⁹

In the past the Court has specifically recognized that fundamental interests exist in such rights as speech and press,²⁰ religion,²¹ association,²² travel,²³ and privacy.²⁴ All of these rights operate as limitations on federal power and few can be adequately protected by state courts and state laws.²⁵ Damages may result from a violation of one of these rights that equal or surpass any injury that may result from an unreasonable search or seizure.²⁶ Thus, it would seem that if the Court has the power to provide a remedy based upon the fourth amendment, it has the power to provide relief for injuries based upon other fundamental constitutional rights. The essence of the Court's power will permit no other conclusion; the same factors that influenced the *Bivens* decision regarding the fourth amendment are equally present when other constitutional guarantees are examined.

The injury complained of in *Bivens* was brought about by the acts of federal agents. The holding of the case, however, should not automatically be interpreted to imply that a constitutional cause of action exists solely for violations of protected interests by federal officials. Although the Court discussed what it termed the greater "capacity for harm" of a federal agent,²⁷ similar actions by state officials may be equally harmful.²⁸ It has long been recognized that through the fourteenth amendment those principles "implicit in the concept of ordered liberty" are applicable to the states.²⁹ To reason that a violated principle which regulates both federal and state action may be allowed redress if the perpetrator is a federal official but not if he is a state agent flies in the face of the Court's rationale that where a federally protected right is involved and injury results from a violation of that right, the Court may redress the injury.³⁰

The logical extension of *Bivens* seems to push in several directions toward expansion of the doctrine therein expressed. There is

¹⁹ *Id.* at 392.

²⁰ *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

²¹ *U.S. v. Ballard*, 322 U.S. 78 (1944).

²² *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

²³ *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

²⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁵ See note 14, *supra*.

²⁶ See *Stanford v. Texas*, 379 U.S. 476 (1965).

²⁷ 403 U.S. at 392.

²⁸ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

²⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

³⁰ 403 U.S. at 397.

a strong suggestion that all of the Bill of Rights guarantees should provide adequate bases for constitutional causes of action when they are violated by either state or federal officials and injury results.⁸¹ How far the Supreme Court will pursue the *Bivens* rationale is yet to be seen. However, the most conservative reading of the case holds that a definitive cause of action for violation of fourth amendment rights by federal agents exists at a constitutional level—a level that transcends both state and federal law.

A HYBRID CAUSE OF ACTION—THE “CONSTITUTIONAL TORT”

Some Aspects of Conventional Tort Theory

The cause of action in *Bivens* arises from a violation of fourth amendment constitutional rights, yet the case resembles that of a conventional tort action. While the concept of a “tort” is not always easy to define with precision,⁸² the principle involves violation of a legally imposed duty with resultant injury to the person to whom the duty is owed.⁸³ This generalization states little more than that a court or jury may award damages in tort actions whenever it finds that some kind of legal duty has been breached and injury has resulted. The law of torts is thus extremely broad, encompassing a wide variety of legal relationships which revolve around the unifying concept of a legal duty.⁸⁴

The action discussed in *Bivens*, therefore, could be viewed as essentially an action in tort; the necessary legal duty is imposed by the fourth amendment and the consequent injury flows from a violation of this duty. Moreover, the Court’s language in *Bivens* is consistent with that often used in articulating general tort theory.

⁸¹ Such fundamental constitutional rights as speech and press, religion, privacy, and travel could provide the foundation for a *Bivens* type cause of action. As stated in the text, there is little to distinguish these rights from the fourth amendment right protected by the *Bivens* cause of action.

⁸² See W. PROSSER, LAW OF TORTS § 1, at 1 (4th ed. 1971) [hereinafter cited as W. PROSSER].

⁸³ “A tort is a legal concept possessing the basic elements of a wrong with resultant injury and consequential damages which is cognizable in a court of law.” 86 C.J.S. TORTS § 1 (1954). “A ‘tort’ . . . consists in a violation of a duty imposed by general law or otherwise upon all person occupying the relation to each other which is involved in a given transaction . . .” *Coleman v. California Yearly Meeting of Friends Church*, 27 Cal. App. 2d 579, 81 P.2d 469 (1938). “A tort is an unlawful violation of a private legal right.” *J.M. Griffin & Sons v. Newton Butane Gas & Oil Co.*, 162 Ala. 424, 50 So. 2d 370 (1951).

⁸⁴ Legal duties may be derived from such sources as common law, statutes, and sometimes even a moral duty so compelling as to be recognized by law. A legal duty should be differentiated from the type of duty that arises in a contract. The duty resulting from a contract is usually said to be consensual. W. PROSSER, *supra* note 32, at 4-7.

The Court states that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief."³⁵ Regarding ordinary tort actions, Prosser states that "[w]hen it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy."³⁶ The basis for the remedy allowed in *Bivens* and that recognized under general tort law is fundamentally the same—the need to supply relief for injury resulting from the violation of a legal duty.

The unique aspect of *Bivens*, insofar as tort law is concerned, is that the source of the legal duty is the Constitution. Since the Constitution enunciates the supreme law of the land, legal duties imposed by that document must be paramount to any other legal considerations of less than constitutional stature. *Bivens*, therefore, expounds what could be termed a "constitutional tort." If logically extended to other constitutional guarantees and to state action, the significance of this type of "tort" could be far reaching.

Viewing *Bivens* for the moment in terms of conventional tort theory, several interesting questions are presented. Are conventional tort defenses available? More specifically, is the defense of sovereign immunity applicable to a case involving the significant violation of one's constitutional rights? May the government violate one's constitutional rights and then safely hide behind the "nonconstitutional" doctrine of sovereign immunity?³⁷ Resolution of this question necessitates at least a brief examination of the traditional bases underlying the notions of sovereign immunity.

The Traditional Role of Sovereign Immunity

Strictly applied, sovereign immunity effectively avoids governmental liability for the tortious conduct of its agents. Therefore, unless the government consents to be sued, victims of torts committed by governmental agents are left without judicial redress.

The origin of the doctrine in the United States is vague.³⁸ Early courts seemed content to accept the doctrine as a fundamental principle of government and refused to delve into the conflict between the ancient concept stemming from a feudal system and the

³⁵ 403 U.S. at 396, quoting from *Bell v. Hood*, 327 U.S. 678, 684 (1944).

³⁶ W. PROSSER, *supra* note 32, at 3.

³⁷ See note 14, *supra*.

³⁸ See, for pre-United States history of sovereign immunity, Borchard, *Governmental Responsibility in Tort (Pt. IV)*, 36 YALE L.J. 1 (1926) [hereinafter cited as Borchard].

new ideas evolving under a constitutional democracy. The United States Supreme Court recognized sovereign immunity almost without question, meekly accepting the English notion that the "King may do no wrong."³⁹ The rationale used by the courts, including the United States Supreme Court, in adopting a doctrine so incongruent with basic democratic principles, is suggested by some curious language emanating from a nineteenth century Alabama court:

Although the individuals who have the administration of public affairs, may commit very gross outrages, it is not congruous with the ideas of order and duty, that the State, the august and sovereign body whose servants they are, from which proceed all civil laws, and to which we owe unstinted respect and honor, should be held capable of doing wrongs, from which she should be made answerable as for tortious injuries, in her own courts to her own children or subjects.⁴⁰

Three decades later Justice Holmes rationalized sovereign immunity by stating that:

[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.⁴¹

Although Holmes' logic was arguably faulty,⁴² the doctrine of sovereign immunity was by 1907 firmly entrenched in the law of the United States.

With the doctrine imbedded, logically or not, in its judicial framework, the United States began to feel pressures from the resulting inequities. Individuals with claims against the government attempted to get special legislation passed by Congress allowing them to recover damages. As claims mounted in a specific area, Congress would pass a narrowly drawn statute giving its consent

³⁹ Early applications of sovereign immunity concerned the states. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). The doctrine was first applied to the United States in *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834) in a mere *obiter* assumption by Chief Justice Marshall. The doctrine was used later in *United States v. Lee*, 106 U.S. 196 (1882); *The Siren*, 74 U.S. (7 Wall.) 152 (1869); *Nichols v. United States*, 74 U.S. (7 Wall.) 122 (1869). In none of these cases is a satisfactory explanation offered as to why such a doctrine exists in the United States. For a general history of sovereign immunity in the United States, see Kramer, *The Governmental Tort Immunity Doctrine in the United States*, 1966 U. ILL. L. FORUM 795.

⁴⁰ *State v. Hill*, 54 Ala. 67, 68 (1875).

⁴¹ *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907). Holmes' rationale is certainly not appropriate when the legal right concerned is based upon the Constitution. Holmes states that there can be no remedy "as against the authority that makes the law." Since Congress did not "make" the law expressed by the Constitution, there is no logical reason why Congress should consider itself in a special nonexempt position.

⁴² See Borchard, *supra* note 38, at 35, indicating that even the early English concept of "the King can do no wrong" allowed certain remedies against the sovereign.

to be sued under those particular circumstances.⁴³ In 1887 Congress passed the Tucker Act, in which the United States gave its general consent to be sued in actions not sounding in tort.⁴⁴

On the whole, these legislative attempts to provide relief were cumbersome and did not prevent the injustices resulting from governmental immunity to general tort claims.⁴⁵ Finally, in 1946, the Federal Tort Claims Act was passed, and it appeared that the United States was ready to accept responsibility for the torts of its agents. In the Federal Tort Claims Act the government gave its consent to be sued on most tort claims.⁴⁶ The effect of the Act was not to create new causes of action where none existed before, but to waive immunity from recognized causes of action.⁴⁷ The Act was designed to provide a workable, consistent, and equitable system of remedies against the government.⁴⁸ Compared with the inequities that existed prior to its passage, the Act did provide significant benefits to individuals wronged by the federal government.

Despite the passage of the Federal Tort Claims Act, however, sovereign immunity at the federal level is hardly a moot issue. Important exceptions to the government's general waiver of immunity are contained in the Act.⁴⁹ Indeed, most of these exceptions appear to involve the very issues that would form a constitutional cause of action as developed in *Bivens*.

⁴³ E.g., patent infringement, 36 Stat. 851 (1910); maritime torts, 41 Stat. 525 (1920); injury to oyster beds caused by dredging operations, 49 Stat. 1049 (1935).

⁴⁴ 24 Stat. 505 (1887).

⁴⁵ Gillhorn, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947).

⁴⁶ [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1971).

⁴⁷ *National Mfg. Co. v. United States*, 210 F.2d 263, 275 (10th Cir. 1954), cert. denied, 347 U.S. 967 (1954).

⁴⁸ *Feres v. U.S.*, 340 U.S. 135, 139 (1950).

⁴⁹ "[S]ection 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .

. . . . (b) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . ." 28 U.S.C. § 2680(a), (b) (1971).

The two major exceptions to the general waiver of immunity in the Act are broadly construed⁵⁰ and concern conduct that is either discretionary or intentional.⁵¹ Since the constitutional guarantees enunciated by the Bill of Rights are generally construed to protect individuals from the affirmative acts—i.e., acts which are either intentional or within the scope of discretionary authority—of government, most “constitutional torts” would fall outside the general waiver of federal immunity. The Court of Appeals for the Fifth Circuit has specifically held that the mere fact that constitutional rights are involved is not sufficient to avoid the Act’s exceptions.⁵² Ostensibly, relief for a “constitutional tort” will lie only when an individual’s rights are negligently infringed by the government—a limitation that will seriously hamper the effectiveness of *Bivens*.

Thus, in many important instances a claim for relief under the *Bivens* theory of “constitutional tort” will directly confront the traditional doctrine of sovereign immunity. Since most of the possible constitutional causes of action would lie within the exceptions to the Act, i.e., either discretionary or intentional conduct, sovereign immunity could be viewed as a potentially dangerous foe which might effectively destroy the significance of *Bivens*.

There has, however, been a distinct trend in the courts in recent years away from sovereign immunity. Many courts have become increasingly antagonistic toward the restrictive and often unjust applications of the doctrine.⁵³ At the state level many legis-

⁵⁰ See *Dalehite v. United States*, 346 U.S. 15 (1953); *Broadway Open Air Theatre v. United States*, 208 F.2d 257 (4th Cir. 1953); *Klein v. United States*, 167 F. Supp. 410 (D.C.N.Y. 1958), *aff’d*, 268 F.2d 63 (2d Cir. 1959). *But see* *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Builder’s Corp. of America v. United States*, 320 F.2d 425 (9th Cir. 1963), *cert. denied* 376 U.S. 906 (1963).

⁵¹ The Bill of Rights was designed primarily to protect the individual from certain types of affirmative government action. The Federal Tort Claims Act, on the other hand, was passed mainly to redress negligent acts of the government. This is apparent from the discretionary and intentional types of conduct excluded by 28 U.S.C. § 2680(a), (h) (1971). Thus, two different purposes are involved and one cannot rely upon the Federal Tort Claims Act to protect constitutional rights, a function for which it was not designed.

⁵² *United States v. Faneca*, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1964); *Morton v. United States*, 228 F.2d 431 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 975 (1956). In *Morton*, a prisoner alleged that prison officials held him without official commitment, deprived him of food and medical services, subjected him to forms of mental and physical cruelty, and deprived him of use of the mails; his claims were held not to state a cause of action since they fell within the exceptions of 28 U.S.C. § 2860(a), (h) (1971).

⁵³ The following cases are drawn from jurisdictions expressing displeasure with the doctrine of sovereign immunity. Arizona—*Stone v. Arizona Highway Comm’n*, 93 Ariz. 384, 381 P.2d 107 (1963); California—*Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Florida—*Hargrove v. City of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); Illinois—*Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Kentucky—*Haney v. City*

latures have followed the lead of their state courts and have passed statutes that waive immunity to tort suits against the state.⁵⁴ The degree to which the immunity is waived varies greatly, but most states have recognized the need for some type of relief from the harsh limitations of sovereign immunity. Still, the doctrine is not dead at the state level either. Many state statutes contain, at the very least, exceptions similar to those found in the Federal Tort Claims Act.⁵⁵ Thus, sovereign immunity as it pertains to the kind of "constitutional tort" action described in *Bivens* remains a serious obstacle at the state as well as the federal level.

The vitality of sovereign immunity, at the state level at least, may also be questioned when viewed against the background of federal statutes enacted to protect particular constitutional rights. For example, 42 U.S.C. § 1983⁵⁶ provides a cause of action against persons acting under color of state law who violate any right guaranteed by the fourteenth amendment. However, there are two serious limitations to this statutory remedy for the violation of constitutional rights. First, the statute does not apply to persons operating under the color of federal law;⁵⁷ second, "persons" does not include governmental bodies.⁵⁸ Thus, in most cases governments may not be

of Lexington, 386 S.W.2d 738 (Ky. 1964); Michigan—*Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); Minnesota—*Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); Nevada—*Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963); Washington—*Kelso v. City of Tacoma*, 63 Wash. 2d 913, 390 P.2d 2 (1964); Wisconsin—*Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). For a detailed discussion on the state judicial action away from sovereign immunity, see Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. FORUM 919.

⁵⁴ E.g., Alaska—ALASKA STAT. §§ 09.50.250-.300 (Supp. 1965); California—CAL. GOV'T CODE §§810-996.6 (West 1966); Illinois—ILL. ANN. STAT. ch. 37, §439.8(d) (1966); New York—N.Y. CT. CL. ACT § 8 (McKinney 1963); Vermont—VT. STAT. ANN. tit. 12, §560 (Supp. 1965); Washington—WASH. REV. CODE ANN. §492.090 (Supp. 1965). See also Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. FORUM 919. For specific problems concerning California immunity see Van Alstyne, *Governmental Tort Liability*, 10 U.C.L.A. L. REV. 463 (1963).

⁵⁵ See Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L. FORUM 919.

⁵⁶ Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1970).

⁵⁷ This was illustrated in *Bivens*, where petitioner alternatively pleaded a cause of action based on 42 U.S.C. § 1983. The Court of Appeals affirmed dismissal of that action since the federal agents had been operating pursuant to federal law. 409 F.2d 718 (2d Cir. 1969). The Supreme Court did not even consider the issue. 403 U.S. 388 (1971).

⁵⁸ *Monroe v. Pape*, 365 U.S. 167 (1961); *Bennett v. California*, 406 F.2d 36 (9th Cir. 1969); *Wilcher v. Sain*, 311 F. Supp. 754 (N.D. Cal. 1970). Note that in

liable under this statute,⁵⁹ and the inequities characteristic of sovereign immunity persist—the government may violate one's constitutional rights and remain totally immune.

Thus, even today the doctrine of sovereign immunity appears to be very much alive. Although governmental immunity from tort liability has been soundly criticized for many years by a wide variety of writers,⁶⁰ the concept lingers on. There can be little doubt that this increasingly anachronistic doctrine still has a strong hold upon the judicial and legislative minds of both state and federal governments. Ironically, the remaining strength of sovereign immunity is often concentrated in areas protecting the government from suit when it affirmatively violates an individual's constitutional rights. Under the Federal Tort Claims Act the federal government, for example, will be liable when one of its trucks negligently injures a pedestrian, but not when one of its agents intentionally holds a prisoner without food or opens fire on a group of protesting students.⁶¹ The appalling conclusion is inevitable: the governmental entity, if allowed to cower behind the feudal doctrine of sovereign immunity, remains free from liability for many abuses that the Constitution was specifically created to protect against.

THE APPROACHING SHOWDOWN: SOVEREIGN IMMUNITY VERSUS CONSTITUTIONAL RIGHTS

The *Bivens* case has brought into focus the stark contrast between individual rights derived from the Constitution and governmental interests consistent with sovereign immunity. If in the typical *Bivens* situation the government is to be immune from suit, the remedy provided by the case is moot; liability for a governmental violation of basic constitutional rights will continue to exist only at the whim of Congress. But is the principle of sovereign immunity compatible with a "tort" action emanating from a constitutional duty? This writer contends that it is not.

Wilcher a municipality was held to be exempt from 42 U.S.C. § 1983 even though California allows its municipalities to be sued. CAL. GOV'T CODE § 815.2 (West 1966).

⁵⁹ For a discussion of a possible lessening of this government exemption, see Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201 (1971); Note, *Grievance Response Mechanisms for Police Misconduct*, 55 VA. L. REV. 909 (1969). The views expressed in these articles have come to fruition in at least one case, *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971).

⁶⁰ See Borchard, *Government Liability in Torts* (pts 1-3), 34 YALE L.J. 1, 129, 229 (1924-25); Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. CHI. L. REV. 610 (1955); Lefler and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954).

⁶¹ *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948).

Unfortunately, the potential destruction of the cause of action in *Bivens* as a "constitutional tort" may be contained within the case itself. Although the Court did not even consider the immunity issue, the case indicates that Congress *could* limit or destroy the action if it were so inclined.⁶² The possibility that Congress has such power raises important constitutional considerations that are basic to the relative functions of the Supreme Court and Congress. It is to these issues we now turn.

Jurisdiction to Hear the Constitutional Issue

Article III, section 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁶³ The Constitution makes it clear, therefore, that federal courts other than the Supreme Court are created by authority of Congress and are subject to complete congressional control. The Supreme Court, however, occupies a different relationship to Congress. All judicial power is delegated by the Constitution to that body. Congress may create, alter, or destroy lower federal courts as it pleases.⁶⁴ It may not however—subject to the limitation discussed below—tamper with the Supreme Court.⁶⁵

Section 2 of article III provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution"⁶⁶ This broad grant of power is limited, however, by subsequent language:

In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*⁶⁷

Herein lies the crux of the problem. What exceptions may Congress make concerning the Supreme Court's ability to hear constitutional issues? Does Congress have, through its powers over the Supreme Court's appellate jurisdiction, complete control over what constitutional issues the Court may hear?

⁶² One of the issues discussed in *Bivens* is whether the Court has the power to award damages absent any express congressional authorization; the Court assumes that if such relief were expressly prohibited by Congress, the Court could not grant it. 403 U.S. at 397.

⁶³ U.S. CONST. art. III, § 1.

⁶⁴ *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *United States v. Arizona*, 214 F.2d 389 (9th Cir. 1954). It logically follows that, since Congress may create these courts, that body may also control their jurisdiction and remedies. *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960).

⁶⁵ *Clark v. Bd. of Educ.*, 374 F.2d 569 (8th Cir. 1967).

⁶⁶ U.S. CONST. art. III, § 2.

⁶⁷ *Id.* (Emphasis added).

Neither the intent of the Framers of the Constitution nor the subsequent development of the American judicial system indicates that Congress is to have such total mastery of the Court and thus the Constitution.⁶⁸ If Congress were to so thoroughly control the Supreme Court's ability to hear constitutional issues, the Constitution's specific grant of judicial power to "all Cases, in Law and Equity, arising under this Constitution" would be rendered meaningless. The Supreme Court would occupy a position identical to "such inferior Courts as the Congress may from time to time ordain and establish" whenever a constitutional question was raised. The Constitution must be read and interpreted as an interrelated whole; one section should not be used to defeat another when a more con-

⁶⁸ The Framers intended to create a balance of power among the three branches of the federal government. See M. FERRAND, *THE FRAMING OF THE CONSTITUTION* (1913). Alexander Hamilton stated that:

There ought always be a constitutional method of giving efficacy to constitutional provisions. What for instance would avail restrictions on the authority of the State legislatures without some constitutional mode of enforcing the observance of them? . . . No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them.

THE FEDERALIST No. 80 at 535 (E. Cooke ed. 1961).

One expert has summarized the intent of the Framers thusly:

It is reasonable to conclude . . . that the Constitutional Convention gave Congress authority to specify . . . orderly procedures and to modify the jurisdiction from time to time in response to prevailing social and political requirements, within the limits imposed by the Court's essential constitutional role. It is not reasonable to conclude that the Convention gave Congress the power to destroy that role. Reasonably interpreted, the clause means "With such exceptions and under such regulations as Congress may make, not inconsistent with the essential functions of the Supreme Court under this Constitution."

Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 171 (1960).

Subsequent judicial history has further demonstrated the power of the Supreme Court vis-à-vis Congress. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), the Court decided that the Constitution was "superior paramount law" and the Court was vested with the ultimate authority to uphold that law. This doctrine of judicial review has remained firmly established in our legal system. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The Supreme Court is still the final arbiter of the Constitution and if access to that forum is denied, then the Court is prohibited from exercising its most important function. As Marshall stated in *Marbury*:

The judicial power of the United States is extended to the Supreme Court to all cases arising under the constitution. Could it be the intention of those who gave this power, to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained.

Marbury v. Madison, *supra*, at 178. The concept of the Supreme Court as the protector against invasion of constitutional rights is so interwoven with the fabric of our democratic system that any encroachment upon that position is suspect. *Matthews v. Rogers*, 284 U.S. 521 (1932); *Hargrove v. McKinney*, 413 F.2d 320 (5th Cir. 1969).

No legislative body, federal or state, may deny the Court authority to hear a constitutional issue. "Congress surely cannot dilute or abrogate existing constitutional guarantees in the guise of exercising its authority to vest, withhold or restrict the judicial power of inferior courts." *Petersen v. Clark*, 285 F. Supp. 700, 705 (N.D. Cal. 1968). To hold otherwise would subject the Constitution to legislative control, clearly a violation of judicial precedent.

sistent interpretation exists.⁶⁹ The section providing Congress with the power to make certain regulations must not be interpreted as providing that body with the authority to deprive the Court of all meaningful judicial power to hear a constitutional question.⁷⁰

The Due Process Limitation on Congressional Regulation

Two constitutional provisions contained in article III, section 2—the right to be heard on a constitutional issue and the power of Congress to regulate the appellate jurisdiction of the Supreme Court—might at first glance appear to be mutually repugnant. The solution to this apparent dilemma, however, is found by fundamental constitutional interpretation. Congress may regulate access to the Supreme Court only in a *reasonable* manner; any unreasonable limitation upon the Court's ability to hear a constitutional question constitutes a violation of the due process clause of the fifth amendment. Such an interpretation, of course, makes the Constitution logically consistent and is fully in line with contemporary concepts of constitutional law.⁷¹

Congress may control appellate jurisdiction in a reasonable manner; it may require that certain procedures be followed or that particular legal principles which are not in conflict with the Constitution be obeyed.⁷² Some matters may be limited to a particular type of federal court.⁷³ Such regulations are designed to expedite the smooth flow of litigation within the federal judicial system and to ensure review consistent with principles of American jurisprudence. Such was undoubtedly the purpose behind article III. When, however, the congressional power to regulate the Supreme Court's appellate jurisdiction is utilized to deprive an individual of a hearing concerning the violation of his constitutional rights,

⁶⁹ See *Lemon v. Bossier Parish School Bd.*, 240 F. Supp. 743 (W.D. La. 1965); *Heitsch v. Kavanagh*, 97 F. Supp. 749 (E.D. Mich. 1951), *aff'd*, 200 F.2d 178 (6th Cir. 1952), *cert. denied*, 345 U.S. 939 (1953).

⁷⁰ See Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960). See also Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597 (1958); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962).

⁷¹ See *Estep v. United States*, 327 U.S. 114, 130 (1946) (concurring opinion); *Yakus v. United States*, 321 U.S. 414 (1944); *St. Josephs Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); *Ex parte Young*, 209 U.S. 123 (1908); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948); *Petersen v. Clark*, 285 F. Supp. 700 (N.D. Cal. 1968). See also Ratner, *Congressional Power Over Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

⁷² E.g., a state law challenged as unconstitutional must be construed by a state court prior to federal action. *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945). Constitutional questions must be raised in the lower court. *Bailey v. Anderson*, 326 U.S. 203 (1945).

⁷³ *Lockerty v. Phillips*, 319 U.S. 182 (1943).

questions of due process arise.⁷⁴ As stated previously, when congressional regulations made pursuant to article III, section 2 conflict with notions of due process, the regulations must fall.

We have seen that the doctrine of sovereign immunity as codified by the Federal Tort Claims Act limits the federal courts' ability to hear certain complaints. Such a limitation is invalid only when it violates the constitutional mandate of due process. The question remains, therefore, whether sovereign immunity violates due process when it prevents a constitutionally based tort from being heard. Indications are that it does.

Chief Justice Warren in *Reynolds v. Sims*⁷⁵ stated a proposition basic to the question presented here: denial of any constitutionally protected right *demands* judicial protection.⁷⁶ Moreover, it has been held in several instances that where constitutional rights are concerned the due process clause⁷⁷ guarantees reasonable access to the courts. The notion of judicial "fairness" intrinsic to due process will permit no other conclusion—a denial of fundamental rights should never go without redress.⁷⁸

⁷⁴ The jurisdictional amount necessary for access to federal courts raises interesting questions in this regard. 28 U.S.C. § 1331 (1966) requires that for a federal court to have jurisdiction, damages of at least \$10,000 must be alleged when a federal question is raised. The rationale behind the requirement is that it keeps the federal courts free from petty, insignificant claims. It also could prohibit many valid constitutional issues from being heard in any forum. This issue, however, is generally rendered moot owing to a series of statutes that waive jurisdictional amounts when particular types of issues are in controversy. See C. WRIGHT, *FEDERAL COURTS* § 32 (1963). Indeed, many aspects of the congressional power to control appellate jurisdiction have not come under close scrutiny because of a general congressional policy of providing federal courts with broad jurisdiction.

⁷⁵ 377 U.S. 533 (1964).

⁷⁶ See generally *Shelly v. Kraemer*, 334 U.S. 1 (1948); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Knoll Associates, Inc. v. F.T.C.*, 397 F.2d 530 (7th Cir. 1968); *Wolff v. Selective Service Local Bd.*, 372 F.2d 817 (2d Cir. 1967); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966); *Thigpen v. Meyers*, 211 F. Supp. 826 (W.D. Wash. 1962), *aff'd*, 378 U.S. 554 (1963); *Parker v. Lester*, 98 F. Supp. 300 (N.D. Cal. 1951), *appeal dismissed*, 191 F.2d 1020 (9th Cir. 1951).

⁷⁷ Although the due process clauses of the fifth and fourteenth amendments may seem to differ, the same principles are applicable to each. *Earnest v. Willingham*, 406 F.2d 681 (10th Cir. 1969); *Foley Securities Corp. v. C.I.R.*, 106 F.2d 731 (8th Cir. 1939).

⁷⁸ *DeWitt v. Pail*, 366 F.2d 682 (9th Cir. 1966); *Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir. 1963); *Hatfield v. Bailleaux*, 290 F.2d 632, 636 (9th Cir. 1961). Although these cases involve criminal actions, where due process is concerned courts need not distinguish between criminal and civil cases. "It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case." *Lee v. Habib*, 424 F.2d 891, 901 (D.C. Cir. 1970). The fundamental requisite of due process is the opportunity to be heard. *Id.*

See also *Escarlar v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970), *cert. denied* 400 U.S. 853 (1970); *Holmes v. New York Housing Authority*, 398 F.2d 262 (1968).

The "reasonableness" of access to the courts may often depend upon the importance of the issue to be heard. Certainly an issue based upon the Constitution is of the highest importance.⁷⁹ As discussed previously, if *Bivens*' claim could not be heard in a federal court based upon a constitutional right, any relief would be effectively denied. Thus, if sovereign immunity prevents constitutional claims from being heard, violation of the rights involved will go totally without remedy. The Supreme Court has stated that "any deprivation of constitutional rights calls for prompt rectification. . . . The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."⁸⁰ Sovereign immunity hardly presents an "overwhelmingly compelling reason" to render adjudication of a violation of a constitutional right totally nugatory.⁸¹

Use of the due process clause to protect constitutional rights in situations similar to those considered in this comment is not without precedent.⁸² For example, in *Miller v. Howe Sound Mining Co.*,⁸³ Congress had placed certain jurisdictional requirements on claims concerning compensation for private property that had been taken by the federal government. The result of these limitations was to deny some claimants access to any judicial hearing. The court in *Miller* held that the denial of access to the courts to hear a constitutionally protected right deprived the claimant of due process of law. The court further stated that "Congress cannot destroy constitutionally protected property rights by the expedient of withdrawing jurisdiction from every court in which suits for enforcement could be brought."⁸⁴ In cases like *Bivens*, Congress might attempt to use the same technique to deny a remedy for a "constitutional tort"—i.e., deny plaintiffs access to any court through utilization of sovereign immunity. Surely a fatal difference between the situation in *Miller* and that in *Bivens* may not be maintained because of a superiority of constitutionally protected property rights over constitutionally guaranteed individual rights. Thus, *Miller* lends strong support to the inevitable conclusion that sovereign immunity may

⁷⁹ See note 68, *supra*.

⁸⁰ *Watson v. City of Memphis*, 373 U.S. 526, 532-33 (1963).

⁸¹ Whatever justification may have existed at one time for sovereign immunity, it is no longer applicable, especially on the federal level. Such contentions as inability of the government to afford tort liability or that absence of the doctrine invites a landslide of lawsuits against the government have been shown to be without merit. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

⁸² The fifth amendment provides, in part, that no "private property be taken for public use, without just compensation." U.S. CONST. amend. V, § 1.

⁸³ 77 F. Supp. 540 (E.D. Wash. 1948).

⁸⁴ *Id.* at 545.

not be used as a jurisdictional device to deny a judicial hearing of an individual's fundamental rights.

Remedies

Assuming, *arguendo*, the inability of Congress to bar jurisdictional access to the Supreme Court for the hearing of a "constitutional tort" claim, the question of what *remedies* the Court may provide remains. *Bivens* implied that Congress could prohibit the Court from granting remedial relief for a "constitutional tort."⁸⁵ This view is clearly inconsistent with both judicial precedent and the due process clause of the fifth amendment.

There can be little doubt that no legal right has been protected if a court having jurisdiction lacks the ability to grant an effective remedy.⁸⁶ The need for federal courts in particular to "fashion judicial remedies to realities to assure actual enjoyment of constitutional ideals" is certainly not novel—it has been suggested in several cases.⁸⁷ Federal courts, moreover, have used their power to "fashion" remedial relief in a variety of situations demanding judicial protection.⁸⁸

The ability of the Court to provide relief for a "constitutional tort" can be analogized to certain instances of statutory interpretation where the Court, after granting a remedy not specifically authorized by the statute, claimed it was merely fulfilling congressional intent.⁸⁹ For example, in *J.I. Case Co. v. Borak*,⁹⁰ the Court stated:

It is for federal courts to adjust their remedies so as to grant necessary relief where federally secured rights are invaded . . . and when a federal statute provides for a general right to sue for such invasion, federal courts may use any remedy available to make good the wrong done.⁹¹

The federal courts are entrusted with the interpretation of the Constitution as well as congressional statutes. Thus, these same courts

⁸⁵ 403 U.S. at 397.

⁸⁶ The Supreme Court put the issue this way: "Let the remedial process be inadequate or unjust and the meaning of judicial review ceases to be clear." *Yakus v. United States*, 321 U.S. 414 (1944).

⁸⁷ *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967); *United States v. Ward*, 349 F.2d 795, 802 (5th Cir. 1965).

⁸⁸ *Jacobs v. United States*, 290 U.S. 13 (1933) [damages for unconstitutional taking of property]; *Weeks v. United States*, 232 U.S. 383 (1914) [exclusionary rule]; *United States v. Lee*, 106 U.S. 196 (1882) [action of ejectment]; *Brewer v. Hoxie School Dist.*, 238 F.2d 291 (8th Cir. 1957) [injunctive relief]; *Nash v. Air Terminal Serv.*, 85 F. Supp. 545 (E.D. Va. 1949) [damages for deprivation of equal protection].

⁸⁹ *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947).

⁹⁰ 377 U.S. 426 (1964).

⁹¹ *Id.* at 433.

should have a similar ability to provide suitable remedies for violations of the Constitution.

Moreover, important procedural distinctions increase the significance of the federal courts' power to "fashion" judicial remedies where the question under consideration is of a constitutional rather than a statutory nature. As the *Borak* case indicated, Congress could *specifically* limit the judicial remedial response. Congress may not, however, unreasonably limit the ability of the Supreme Court to interpret constitutional provisions.⁹² Similarly, the Court must not be limited in its effort to provide appropriate remedies for bona fide constitutional claims. Any unreasonable limitations would essentially deprive federal courts of their ability to hear a constitutional issue—a violation of due process. As one eminent legal scholar has said:

There is nothing in the historical development of remedial jurisprudence to suggest that remedial law has not been fully applied to protect personal interests defined in "political" documents like the Constitution. . . . A federally created remedy in damages is possible under existing decisions; is sensible under existing circumstances; and is necessary for the protection of essential liberties.⁹³

The ability of the federal courts to provide remedies for governmental violations of constitutionally protected rights is essential to the existence and continuance of those rights; this ability is perhaps the most important element of due process in its most meaningful form.

CONCLUSION

There can be little doubt after *Bivens* that the denial of access to the courts for a "constitutional tort" is violative of the due process provision of the fifth amendment. Congress may not use sovereign immunity as a device to defeat the hearing of a "constitutional tort" claim and may not so unreasonably limit the Court's remedial responses as to violate due process.

Bivens opened the door to a cause of action based solely upon the Constitution. Since the legal duty upon which that cause of action is based is the Constitution, it may be defeated by defenses

⁹² "[Congress] must not so exercise that power [to control lower court jurisdiction] as to deprive any person of life, liberty, or property without due process of law." *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948).

⁹³ *Katz, The Jurisprudence of Remedies*, 117 U. PA. L. REV. 1, 3 (1968). See also *Bell v. Hood*, 327 U.S. 678 (1944); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1943); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Hill, Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

only of a comparable constitutional nature. To contend otherwise would be to subordinate the Constitution to doctrines of lesser legal stature. There can be little doubt that sovereign immunity as retained by portions of the Federal Tort Claims Act is of such lesser legal significance. If the government is to be permitted to shield itself from its own violations of the Constitution, a wronged individual's fundamental rights will be effectively extinguished.

Whether the "constitutional tort" will provide an adequate safeguard for particular individual rights is difficult to predict.⁹⁴ Due process, however, demands that constitutional rights be protected by the Supreme Court and that adequate remedies for infringement of these rights be provided. The Federal Tort Claims Act may be adequate legislation where conventional tort actions are concerned,⁹⁵ but a different situation is presented when the tort action is interwoven with a constitutional issue. The exceptions contained within that Act should no longer be utilized to defeat fundamental rights guaranteed by the Constitution.

It is time for government, both federal and state, to recognize that applications of sovereign immunity too frequently result in unfettered violations of the Constitution. The *Bivens* case has taken the first step by recognizing a cause of action based solely upon the Constitution. The Supreme Court is now in the position to continue its drive toward ensuring truly adequate protection of the basic constitutional rights of all citizens. Where sovereign immunity would deny an effective remedy in such a case, that doctrine must be unhesitatingly challenged, struck down, and discarded.

Edward P. Davis, Jr.

⁹⁴ See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

⁹⁵ Even in the case of conventional tort actions an argument may be made that sovereign immunity is unconstitutional. Using the equal protection clause, the argument runs, two classes are created by sovereign immunity: those injured by nongovernmental tortfeasors and those injured by governmental tortfeasors. Since equal protection forbids unreasonable discrimination between protected groups, sovereign immunity is invalid since the doctrine has no rational basis and blatantly discriminates against those victims of government torts. The only court to accept this argument has stated that "a distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances the permissible line between reasonable classification or a rational policy, and a denial of equal protection is crossed." *Krause v. Ohio*, 28 Ohio App. 2d 1, 321 N.E.2d 321, 327 (1971). There is some doubt as to the validity of the equal protection argument; i.e., are tort victims a protected "group"; are all aspects of sovereign immunity capricious? These questions remain. This writer believes, however, that there can be no doubt that when a "constitutional tort" is involved sovereign immunity is not applicable.